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No. 89-927

In The
Supreme Court of the United States
October Term, 1989

IN RE HUBERT L. WILL
Senior Judge of the United States District Court for the Northern District of Illinois, Eastern Division
FOLDING CARTON ANTITRUST LITIGATION, MDL-250

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF HANS ZEISEL IN SUPPORT OF THE PETITION OF HUBERT L. WILL

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 36 of the Rules of this Court, Hans Zeisel hereby moves for leave to file the attached brief as *amicus curiae* in support of the Petition of the Honorable Hubert L. Will. Petitioner has consented to the filing of the brief *amicus curiae;* the respondent judges have not consented.

Hans Zeisel is professor emeritus of law and sociology at the University of Chicago Law School in Chicago, Illinois. Pursuant to the settlement approved by Judges Robson and Will in the *Folding Carton Antitrust Litigation,* MDL-250, the University of Chicago Law School was to receive a $156,000 grant to study the performance of juries

in complex litigation, including class actions and antitrust cases. Professor Zeisel was to be the principal researcher at the University if this project were funded in accordance with the district court's order; without the funding, the project cannot proceed.

Accordingly, Professor Zeisel has a direct and substantial interest in the resolution of this matter. Because a more thorough explanation of Professor Zeisel's research project may help the Court better to understand and evaluate the propriety of the grant (and, more generally, of the settlement which the court of appeals has set aside), Professor Zeisel requests leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF HANS ZEISEL IN SUPPORT OF THE PETITIONER

INTEREST OF *AMICUS CURIAE*

Hans Zeisel is professor emeritus of law and sociology at the University of Chicago Law School in Chicago, Illinois. Pursuant to the settlement approved by Judge Robson (who has since died) and Judge Will in the *Folding Carton Antitrust Litigation,* MDL-250, the University of Chicago Law School was to receive a $156,000 grant to study the performance of juries in complex litigation, including class actions and antitrust cases. Professor Zeisel, who has spent a significant portion of his academic career studying the performance of American juries (see, *e.g.,* H. Kalven, Jr. and H. Zeisel, *The American Jury* (1966)), was

to be the principal researcher at the University if this project were funded in accordance with the district court's order.

The order and opinion of the court of appeals that are the subject of Judge Will's petition[1] declare that the grant to the University of Chicago is void. Professor Zeisel thus has a direct and substantial interest in the resolution of this matter. He believes that a more thorough explanation of his research project may help the Court better to understand and evaluate the propriety of the grant to the University and, more generally, of the settlement which the court of appeals has set aside.

ARGUMENT

The two-year research project which Professor Zeisel intends to commence upon distribution of the grant funds would contribute immensely to understanding the jury's role in complex cases. It also would represent an entirely appropriate *cy pres* use of the unclaimed settlement proceeds.

The complexity of many of today's civil cases poses genuine difficulties for the juries that must receive and assess voluminous evidence and apply sophisticated legal principles. Concerns about jury performance have prompted occasional proposals to abolish the civil jury in complex cases.[2] For most people, however, the question instead has become how best to cope with the difficulties created by such litigation.

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[1] In addition to the Petition of Judge Will, certiorari petitions have been filed by the Certified Plaintiff Class (No. 89-992) and by The Folding Carton Administration Committee. Loyola University of Chicago School of Law, the other grant recipient, has submitted its own brief as *amicus curiae* in support of Judge Will's Petition.

[2] See *In re Japanese Electronic Products Antitrust Lit.*, 631 F.2d 1069 (CA3 1980); see generally *SRI Intern.* v. *Matsushita Elec. Corp.*, 775 F.2d 1107, 1127-31 (CA Fed. 1985) (additional views of Markey, C.J.) (summarizing cases and commentary).

Professor Zeisel's research would begin by determining how well or poorly juries actually perform in complex cases. Trial judges and other participants in completed cases would be interviewed. The researchers would review the files in complex cases to determine how often the juries' verdicts were upheld, modified, and reversed. Research instruments for ongoing and future complex trials, including (where permitted) post-trial interviews with jurors, would provide additional data.

The project also would explore various ways of alleviating the jury's task, and improving its performance, in complex cases. Professor Zeisel thus would examine the utility of options such as instructing the jury on the law at the outset of the trial; providing each juror with an exhibit book during the trial; allowing indirect questioning by jurors; and using special verdicts and interrogatories. Because complex cases often demand long service by the jurors, Professor Zeisel would study the demographic profiles of juries in complex cases, and the effect of the jury's size on its performance.

In short, Professor Zeisel's project seeks to find practical, pragmatic solutions to whatever difficulties juries actually face in complex cases. It has been more than a century since the observation that "[t]he life of the law has not been logic: it has been experience" (O.W. Holmes, *The Common Law* (1881)). The goal of Professor Zeisel's research is to document the law's experience in this area so that appropriate lessons — ones based on careful empirical research, rather than anecdotes or theories that may have little to do with reality — can be learned more quickly than otherwise would be possible.

Professor Zeisel is uniquely qualified to perform this study. Judge Will's opinion below described Professor Zeisel

as "the country's foremost expert on the American jury."[3] His earlier study of the performance of criminal juries (see p. 1, *supra*), demonstrated the desirability of democratizing juror selection in criminal cases so that the jury's sense of justice would better mirror that of the community. This helped lead to the enactment of the 1968 Jury Selection and Service Act, Pub. L. 90-274, 82 Stat. 53 (1968).

The court of appeals never questioned the usefulness of Professor's Zeisel's specific project, or his competence to lead it. Nor did it quarrel with the proposition that, under the *cy pres* doctrine, the district court was empowered to find the "next best use" of the unclaimed settlement funds. Rather, the court of appeals simply disagreed with the district court's view that the grants to Chicago and Loyola fell into this category.

The court of appeals' holding in this regard, even apart from the jurisdictional and jurisprudential problems addressed in the Petition, is unsupportable. Only the court's earlier decision, which suggested that antitrust law had been studied to death, provides any explanation for its view that the grants were inappropriate *cy pres* uses. The parties' subsequent settlement, however, rendered irrelevant the court's disagreement with the *district court's* earlier selection of a *cy pres* application. The court of appeals' failure to give any effect to the parties' agreement as to the proper application of the *cy pres* doctrine was inexcusable.

Moreover, the court of appeals erred in treating the United States government, rather than the class members, as the beneficiary against which any *cy pres* use of the reserve fund should be measured. In advocating a grant to the Federal Judicial Center Foundation, for example,

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[3] *In re Folding Carton Antitrust Litigation*, 687 F. Supp. 1223, 1228 (N.D. Ill. 1988).

the court noted that such a use "would come close to giving the United States back the same type of interest in the Reserve Fund that it would have held under *Folding Carton I*." *In re Folding Carton Antitrust Litigation,* 881 F.2d 494, 502, n. 8 (CA7 1989). The question should have been whether the grant to the University of Chicago furthered the purpose of the original *settlement.* Answering this question in favor of the Chicago grant would have been a simple matter. Professor Zeisel's study would address a problem that concerns plaintiffs in all complex class actions and antitrust cases (and the attorneys who represent them). It thus would benefit persons who have been injured by the same type of conduct that gave rise to the *Folding Carton* litigation.

Research directed at improving the factfinder's performance in class actions and antitrust cases certainly relates more closely to the purpose of the settlement that created the reserve fund than would the work, however laudable, of the Federal Judicial Center Foundation. The court of appeals' attempt to convert the *cy pres* issue into a question of how best to effectuate its earlier ruling reflects the fact, as the Petition explains, that the only entity objecting to the settlement in the court of appeals was that court itself.

CONCLUSION

For the reasons set forth above, Professor Hans Zeisel, as *amicus curiae,* urges the Court to grant Judge Will's

petition and to vacate that portion of the decision below which set aside the grant to the University of Chicago.

Respectfully submitted,

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